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[APPELLATE CRIMINAL JURISDICTION]

LEE SANG CHEAH vs. REX.

[App. Crim. Juris. (McElwaine, C. J.) November 14, 1941]

Common Gaming Houses Ordinance (Cap. 30) — S. 4 sub-s. (c) — Chap Ji Ki lottery — Powers of an Appellate Court.

In criminal appeals an appellate Court should weigh the evidence, always giving proper weight and consideration to such matters as (1) the views of the trial Magistrate as to credibility of witnesses; (2) the presumption of innocence in favour of the accused; (3) the right of the accused to the benefit of any doubt; (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Magistrate who had the advantage of seeing the witnesses.

The weight of the prosecution evidence may be affected by different things, by the seriousness of the discrepancies in the evidence, by the conduct of the witnesses and by the evidence given by and on behalf of the defence.

Sheo Swarup v. King Emperor, 61 Ind. App. 398, and *Mohamed Ghouse v. Rex.* 11 S.S.L.R. 31, applied.

MAGISTRATE'S APPEAL.

Cases referred to:—

(1) *Money v. Leach* 3 Burr. 1742.
(2) *Wilkes v. Wood* Lofft 1.
(3) *Entick v. Carrington* 19 St. Tr. 1029.
(4) *Kee Ah Low v. P. P.* 9 M.L.J. 256, 2 J.L.R. 148.
(5) *Reg. v. Tan Yok Lan* 4 Ky. 668.
(6) *Saminathan v. P. P.* 1936 F.M.S.L.R. 198.
(7) *R. v. Mong Pahn* 10 S.S.L.R. 96.
(8) *R. v. Barker* 57 T.L.R. 626.
(9) *R. v. McNair* 2 Cr. App. R. 2.
(10) *R. v. Graham* 4 Cr. App. R. 218.
(11) *R. v. Henderson* 5 Cr. App. R. 97.
(12) *Letchumy v. P. P.* 1 Mallal's Malayan Cases 129.
(13) *Milan Khan v. Sagai Bepari* 23 Cal. 347.
(14) *Chia Han Kiat v. R.* 6 M.L.J. 261.
(15) *Sheo Swarup v. King Emperor* 61 Ind. App. 398; 51 T.L.R. 10.
(16) *Opium Farmer v. Chin Ah Quee* 4 S.L.J. 33.
(17) *Gan Kim Swee v. Newland* 3 Ky. 108.
(18) *R. v. Ramasamy* 1930 S.S.L.R. 104.
(19) *P. P. v. Wajid Khan* 4 F.M.S.L.R. 166.
(20) *Mohamed Ghouse v. R.* 11 S.S.L.R. 31.

A. J. Braga for appellant.

C. H. Butterfield (Crown Counsel) for the Crown.

Cur. adv. vult.

McElwaine C.J.—This is an appeal from a conviction on a charge of assisting in carrying on a public lottery, to wit a Chap Ji Ki lottery, an offence punishable under section 4(c) of the Common Gaming Houses Ordinance.

On 14th July 1941 a Justice of the Peace issued a search warrant. It was a printed form and was headed with a reference to S. 11 of the Ordinance, the section which deals with search warrants against premises. The form is slightly amended in ink as by deleting "11" and substituting "12", and it begins by reciting that the Justice of the Peace is "satisfied upon written information on oath that there is good reason to believe that a certain person a male Chinese in motor car S. 1779 at Lavender Street and occupied by the public is kept or used as a Common Gaming House." It goes on to authorise and require a search as in a warrant under S. 11.

This improvised form of search warrant is an unhappy nonsensical document.

Apart altogether from the fact that it says nothing about instruments or appliances for gaming being likely to be found on the male Chinese and the fact that it has all the appearances of being a general warrant affecting in some way or other any male Chinese who might be found in this motor car S. 1779, and however such generality may be permissible under S. 11, it does not appear permissible under S. 12 to which such cases as *Money v. Leach,*[1] *Wilkes v. Wood,*[2] and *Entick v. Carrington,*[3] are probably applicable it is only after persons have been searched and incriminating articles found on them that they can be taken before a Police Court. I think the power to arrest is conditional on incriminating articles being first found on the person, and the present appellant was arrested and taken to the Police Station before any attempt was made to search either him or the motor car.

But while the presumption under Ss. 14 and 15 are dependent on the articles being discovered during

the execution of a valid search warrant, *Kee Ah Low v. P. P.*[4], *R. v. Tan Yok Lam,*[5] the presumptions under S. 9 are not so dependent.

In *Saminathan v. P. P.*,[6] Aitken J. said:—

"It is argued that the documents which were found during the search should not have been put in evidence against him, because the police were not in legal possession of them. It was stated that they were really the stolen property of the accused. Here again I have come to the conclusion that the manner in which the police obtained possession of these documents does not concern the Magistrate who is trying the accused: he is only concerned with their relevancy."

I agree with this conclusion. The admissibility is rarely dependent on the manner in which the exhibits are discovered; *R. v. Mong Pahn.*[7] *R. v. Barker,*[8] is a very special case and stands on a different footing. It is akin to a case on a compromise obtained on a promise of favour made by a person in authority.

Mr. Braga then argued that the evidence was too unreliable to support a conviction and that the whole case was a "plant".

The evidence certainly invited a good many comments and observations on the part of the defence, but those comments and observations were made in the Court below and the learned and experienced Magistrate, who tried the case, nevertheless expressly states that he believed the two lance corporals who were the principal Crown witnesses.

A point which appears to me not to have been made in the Court below was, why did the two lance corporals not search the accused before they arrested him, as required by the warrant under which they purported to act? Did they think it would be more impressive if anything discovered were to be discovered as (apart from the cigarette carton and its contents said to have been discovered by one of the lance corporals after arrest) it was discovered, by an Inspector at the Detective Station?

These two lance corporals were taking a great risk in arresting the appellant without first having found incriminating documents upon him, unless they knew that incriminating documents would be found. If no such documents were found they would, since there was no other evidence of guilt, have been liable to a civil action. There was no evidence whatever that they knew or even had reason to suspect that incriminating documents would be found on the appellant.

These lance corporals were not raw recruits. Neither of them was searched before he set out to execute the warrant, though this is a usual precaution when they set out with an Inspector; how much more necessary is it when they are not operating under the supervision of an Inspector?

No attempt was made to ascertain who was the owner of car S. 1779. The appellant was arrested because he was getting into his own car at the door of his own shop and for no other reason.

It was conceded that the appellant's finger prints were not on the cigarette carton which he was alleged to have tried to throw through the open roof of the car, instead of out of the open window beside the appellant who was driving the car. The learned Magistrate's theory to account for the appellant's finger prints not being on the carton is far from satisfactory. He suggests that the appellant may have held the carton by the edges. That would account for the absence of finger prints, but is it likely that it was held by the edges? Was it held by the edges in the attempt to throw it away? If in putting the incriminating documents into the carton he was so cautious as to hold the carton by its edges, it is extraordinary that he was so incautious as to be found with it in his possession.

There was unquestionably evidence to support this conviction, and the Magistrate who saw and heard the witnesses believed that evidence. Such a conviction should not be set aside unless there is shewn to have been some grave error or that it is against the weight of evidence, and in the present case it is only weight of evidence that need be considered.

The Court of Criminal Appeal will not upset the verdict of a jury just because the Judges do not think the case strong or because they doubt whether as jurors they would have found the same way, *McNair,*[9] *Graham,*[10] *Henderson,*[11] but in such cases a conviction might be quashed on grounds of misdirection or non-direction with regard to points which would not necessarily be fatal in a strong case.

An appeal from a single Magistrate is on a somewhat different footing; *Letchumy v. P. P.*[12].

In *Milan Khan v. Sagai Bepari,*[13] Trevelyan and Beverley JJJ said "if the Judge of the Appellate Court had any doubt that the conviction was a right one, and had any doubt as to whether the offence charged had been committed, whatever the original Court did, he should have discharged the accused." If these doubts are occasioned by finding that the conviction is against the weight of evidence, I agree with it.

In *Chia Han Kiat v. R.*[14] Terrell J. said, "But it is the duty of an Appellate Court to be a Judge of fact as well as of law, and it would be abrogating its functions if it made a hard and fast rule never to interfere with a finding of fact, and felt bound to support a judgment which, on a review of all the evidence, it considered clearly to be wrong."

Section 302 of the Criminal Procedure Code allows an appeal in respect of (among other things) any error in fact. The powers of an Appellate Court to differ from a Court which saw and heard the witnesses is strikingly indicated in *Sheo Swarup v. King Emperor,*[15]. Although our Code is not identical with the Indian Code, the following passage from the opinion of the Privy Council is applicable:—

> "it will be observed that upon the express terms of the Code (1) an appeal lies from any order of acquittal passed by any Court other than a High Court; (2) such an appeal (the trial not being by jury) will lie upon a matter of fact; (3) on such an appeal the Court may reverse the order of acquittal, find the accused guilty and pass sentence on him. There is no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate tribunal. Further, it is to be observed that no distinction is drawn as regards the powers of the High Court in dealing with an appeal, between an appeal from an order of acquittal and an appeal from a conviction.
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> "Many authorities were cited to their Lordships which undoubtedly reveal differences of views as to the powers of the High Court in dealing with an appeal from an order of acquittal on a matter of fact. No useful purpose will be served by examining this long list of decisions. It will suffice if their Lordships state the conclusion which they have reached as the result of careful consideration of the full arguments which were addressed to them.
>
> "There is, in their opinion, no foundation for the view apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has 'obstinately blundered', or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice', or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result."

It is therefore competent for the Appellate Court to weigh the evidence, always giving proper weight and consideration to such matters as (1) the views of the trial Magistrate as to credibility of witnesses; (2) the presumption of innocence in favour of the accused; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Magistrate who had the advantage of seeing the witnesses.

The weight of the prosecution evidence may be affected by different things, by the seriousness of the discrepancies in the evidence, by the conduct of the witnesses and by the evidence given by and on behalf of the defence.

If the Magistrate has misappreciated or failed to appreciate the significance of any part of the evidence it may have an important bearing on the weight which the Appellate Court attaches to the evidence as a whole.

In *Opium Farmer v. Chin Ah Quee,*[16] O'Malley C. J. said: "unless the balance of evidence is greatly against the conviction the Court will not interfere"; and in *Gan Kim Swee v. Newland,*[17] Wood J. intimated that an appeal on fact would not be allowed unless the Magistrate's decision was grossly against the weight of evidence.

Section 315 of the Criminal Procedure Code attaches no adverb to the phrase "against the weight of the evidence."

The two above mentioned cases were decided before section 315 was enacted. *Rex. v. Ramasamy,*[18] and *P. P. v. Wajid Khan,*[19] must be regarded as overruled, or at least seriously qualified, by *Sheo Swarup's* case which lends strong support to the judgment of Burton J. in *Letchumy v. P. P.,*[12].

But the governing provision in deciding Magistrates' appeal is section 315. Although the two points to which I have alluded taken into consideration with the other points argued by Mr. Braga have occasioned me some doubt whether I would myself have convicted, that doubt is not sufficiently strong to enable me to say that the conviction is against the weight of evidence, or that the learned and experienced Magistrate who had the advantage of seeing and hearing the witnesses ought to have had a reasonable doubt.

Applying the principles of *Sheo Swarup's* case and of *Mohamed Ghouse v. R.,*[20], I am not satisfied that the conviction was wrong.

As to sentence, the offence is said to be rampant, at least two cases a day coming before this particular Magistrate. A deterrent sentence is obviously necessary.

The appeal is dismissed.

Appeal dismissed.